

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

CARDINAL HOME PRODUCTS, INC.¹

Employer

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

Case 6-RC-11868

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Robin F. Wiegand, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.²

Upon the entire record³ in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The name of the Employer appears as amended at the hearing.

² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by September 29, 2000.

³ The Employer and the Petitioner filed timely briefs in this matter which have been duly considered by the undersigned.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit consisting of all full-time and regular part-time production and maintenance employees employed by the Employer at its Linesville, Pennsylvania facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act. While the parties are in agreement that permanent employees employed by the Employer are properly included in the petitioned-for unit, the Employer contends, contrary to the Petitioner, that temporary or seasonal employees⁴ should be excluded from the petitioned-for unit in that they do not have a reasonable expectation of re-employment from season to season and do not share a sufficient community of interest with the permanent employees.⁵ There are approximately 35 permanent employees, while the number of temporary employees may vary from approximately 39 or higher to 7 or lower. The employees involved herein are not currently represented by any labor organization.⁶

The Employer, an Ohio corporation, with its principal place of business in Linesville, Pennsylvania, is engaged in the manufacture and non-retail sale of outdoor lawn furniture, adjustable jacks and columns for the building industry. Ron Noll is the President of the Employer and Timothy Miller is the Vice-President of Operations. Bob Keil is the Plant

⁴ The Employer offered testimony that it uses the terms “temporary employees”, “seasonal employees” and “utility workers” interchangeably. Since the Employer’s records tend to refer to the disputed classification as “temporary employees”, that designation is used herein.

⁵ The Petitioner urges the inclusion of the temporary employees working during the week preceding the filing of the instant petition.

⁶ The employees sought by the instant petition were previously represented by another labor organization, the United Rubber, Cork, Linoleum and Plastic Workers of America, Local 1067, AFL-CIO-CLC, and the Employer and that Union were parties to a collective-bargaining agreement, which was effective by its terms from April 14, 1980 to April 13, 1983.

Manager, and reporting to Keil is General Foreman Paul Ball. At the plant, there are also a number of other supervisory personnel, namely: Product Manager Mike Moss, Traffic Manager Jim Gagen, Safety Director and Quality Manager Dan Webb, Red Line Supervisor John Martell, Black Line Supervisor Don Zirkle, Black Line Supervisor Henry Regester, Second Shift Red Line Supervisor Leroy Davis,⁷ Shipping Supervisor Dick Amos, Inventory Supervisor Denny Guzikowski and Maintenance Supervisor Jack Mickle.⁸ In addition, Carol Brown is the Office Manager.⁹

The Employer has two production lines, the black line which manufactures the outdoor lawn furniture, and the red line which manufactures the adjustable jacks and columns. While the red line operates year round, the black line is seasonal in its operations, starting in the fall, peaking around the spring, and winding down from the late spring through the early summer. The permanent and temporary employees work on both lines. The Employer operates in two shifts, from 7:00 a.m. to 3:30 p.m. and from 3:30 p.m. to midnight. At the time the hearing opened, on August 16, 2000, there were 30 permanent employees and 6 temporary employees on the first shift and 6 permanent employees and one temporary employee on the second shift.¹⁰

⁷ There was testimony from an employee witness that Davis had quit.

⁸ The parties have stipulated, and I find, that Miller, Keil, Ball, Moss, Gagen, Webb, Martell, Zirkle, Regester, Davis, Amos, Guzikowski and Mickle are all supervisors as defined in Section 2(11) of the Act in that they all have the authority to responsibly direct employees and some of them have the authority to hire, fire, discipline or assign work. The parties have further stipulated that group leaders Rick Messerall and Rick Chizmar are not supervisors and are properly included in the petitioned-for unit.

⁹ The parties have stipulated that Brown is excluded from the unit in that she is a managerial or office clerical employee.

¹⁰ On August 18, 2000, one of the permanent employees quit. On May 17, 2000, there were 24 temporary employees working; on May 24, 2000, there were 12 temporary employees working; on July 27, 2000, there were 15 temporary employees working; and on August 3, 2000, there were 18 temporary employees working. At the time of the hearing, it was the Employer's intention to hire 12 temporary employees in October 2000 and to hire an additional 6 temporary employees in December 2000.

The Employer's personnel records contain numerous errors, omissions and inconsistencies. As the Employer's counsel acknowledged, the records are in "disarray." While they thus cannot be relied on with precision, nevertheless, they can be used to establish general patterns and trends in the Employer's workforce.

The Employer currently has approximately 35 permanent employees. Of these, 8 of the 9 least senior employees started working for the Employer as temporary employees.¹¹ The original date of hire for these 8 current permanent employees who had been hired as temporary employees ranges from December 3, 1992 to April 18, 1997. Thus, with one possible exception, it appears that no current permanent employee was hired directly as a permanent employee within the last 8 years. Further, the record indicates that there have been five permanent employees who quit between the beginning of May 2000 and the close of the hearing herein and have not been replaced, either by a direct hire as a permanent employee or by a conversion of a temporary employee to permanent status.¹²

At various times during the period January 1998 through the time of the hearing, the Employer employed a total of approximately 175 temporary employees. Of these 175 temporary employees, during this same period, approximately 78 were discharged for performance, attendance or other reasons,¹³ and an unknown number of employees quit, thus revealing a high turnover.

The number of temporary employees working during 2000 has varied greatly, but the Employer estimates that during its peak period, there were 39 temporary employees working,¹⁴ and as noted, that number had been reduced to 7 by the time of hearing. Of the temporary employees working during 2000, approximately 17 had been hired and had worked for the Employer before the fall of 1999 (which the Employer identifies as the beginning of its hiring for

¹¹ The other employee, Bonnie McGill, works in the shipping area. The circumstances of McGill's hiring are not apparent from her employment records in evidence; Vice-President of Operations Miller did not testify regarding her hiring; and Plant Manager Kiel testified that he did not know if she had been hired as a temporary employee.

¹² Compare the May 9, 2000 and July 28, 2000 seniority lists and the testimony that Alan Moyer quit on August 18, 2000.

¹³ This is indicated by the handwritten list of discharges prepared by the General Foreman.

¹⁴ This number is based on the foreman's handwritten list of employees working on March 21, 2000. While this list further shows temporary employees hired after March 21, 2000, the list does not disclose employees who quit or were terminated after March 21. Hence, the number of employees working on March 21 is referred to herein.

its busy season). Over the two-and-a-half year period from January 1998 through mid-2000, these 17 temporary employees worked a substantial number of hours. Specifically, the total number of regular hours worked by these 17 temporary employees ranged from 1261 to 4739 hours.¹⁵

The Employer fills its workforce from several sources. It uses its list of laid off temporary employees, referrals from the state unemployment office, responses to its newspaper advertisements, referrals from the current workforce, and applicants who walk in off of the street. Employees who are currently on layoff status are given first consideration. All new hires into temporary positions are told that the position is temporary and ends at some point between April and July, and are provided written documentation that they are considered temporary employees.¹⁶

The temporary and permanent employees work side by side performing the same type of production work. They work the same hours and share common supervision. They are subject to the same work rules and to the same safety rules. Although the Employer has what purport to be separate attendance policies applicable to the temporary and permanent employees, in fact the Employer it applies the “temporary” policy for the first 90 days, and thereafter all employees are covered by the same attendance policy. All employees are

¹⁵ Thus, Ernest Banks was hired in September 1998 and worked a total of 3422 regular hours; Douglas Bilich was hired in December 1996 and worked 4703 regular hours; Raymond Black was hired in March 1999 and worked 2430 regular hours; David Brown was hired in March 1999 and worked 2393 regular hours; Shannon Bryner was hired in February 1998 and worked 4010 regular hours; Joshua Comell was hired in June 1999 and worked 1261 regular hours; Vince Cottrell was hired in November 1998 and worked 2614 regular hours; Jody Emerick was hired in September 1998 and worked 3462 regular hours; Christine Larson was hired in October 1998 and worked 2911 regular hours; Rick Liesen was hired in October 1998 and worked 3059 regular hours; George Lucas was hired in July 1999 and worked 2005 regular hours; Arthur Miller was hired in March 1998 and worked 4739 regular hours; Lori Myers was hired in November 1998 and worked 2133 regular hours; Dorothy Shoffner was hired in November 1998 and worked 2418 regular hours; Holly Simmerman was hired in June 1999 and worked 1459 regular hours; Samuel Thomas was hired in October 1998 and worked 3681 regular hours; and Nick Tustin was hired in December 1998 and worked 2497 regular hours.

¹⁶ Although the Employer argues in its brief that the newly hired temporary employees are told that there is no recall, the testimony cited does not support that assertion. Rather, the testimony reveals that, as part of a compound question, counsel stated that the temporary employees were told that there was no recall, and that the witness did not confirm counsel’s statement in this regard.

provided with the same uniforms, but are not required to wear them. All employees use the same plant facilities, including the same parking area and lunch area, and have the same lunch and break periods.

The Employer essentially maintains a two-tier wage scale. Most temporary employees are classified as utility workers and receive from \$7.21 to \$8.49 per hour, and most permanent employees are classified in other specific job classifications¹⁷ and earn from \$8.49 to \$10.73 per hour. The temporary employees classified as utility workers receive periodic wage increases within that classification. At least 11 employees working for the Employer this spring and summer, whom the Employer nevertheless considers temporary employees, were classified in specific non-utility classifications¹⁸ and some of those 11 received the higher wage rate.

All employees receive the same shift differential, the same across-the-board wage increases and receive the same percentage bonus. The Employer offers paid holidays, but the temporary employees are not eligible for paid holidays until after 2 years of employment.¹⁹ The Employer offers paid vacation based upon years of service, with a separate progression for temporary and permanent employees.²⁰ Temporary employees are eligible for one week of paid vacation after 3 years of employment, while permanent employees are eligible for one week of paid vacation after one year of service, and 8 days of paid vacation with 3 to 5 years of service. After 5 years of service, the progression is the same.²¹ The Employer offers several other

¹⁷ These classifications, as revealed in the Employer's job history reports for permanent employees, include process technician, machine operator, inspector, forklift operator, tow motor, paint technician, welder, tool & die and prototype.

¹⁸ Thus, Ray Black was classified as a welder, Vince Cottrell as a machine operator, Jody Emerick as a welder, Jerry Groover as a tow motor/truckdriver, Rick Liesen as an inspector, George Lucas as a machine operator, Art Miller as a machine operator, Jeremy Peterson as a tool & die level, Sam Thomas as a machine operator, Nick Tustin as a machine operator and Steve Weikal as a welder.

¹⁹ There are 3 temporary employees receiving paid holidays.

²⁰ There is one temporary employee receiving vacation leave.

²¹ These facts are revealed by a comparison of the handwritten summary of terms of employment for utility workers dated October 1999 with the hourly vacation schedule dated May 7, 1987.

benefits to permanent employees, specifically: medical benefits, including medical, dental, prescription and vision, a safety shoe allowance, prescription safety glasses reimbursement, a profit sharing plan, and a savings plan, which benefits are not available to temporary employees.²² The Employer distributes Easter hams and Thanksgiving turkeys and has a summer picnic and a Christmas party; these are available to all permanent employees and to temporary employees working at the time of the event.

Both temporary and permanent employees can bid on available jobs. If a permanent employee bids on a job, he will be awarded the job ahead of any temporary employee. Among permanent employees, jobs are awarded based upon seniority and qualification. Among temporary employees, jobs are awarded based upon qualification without regard to seniority. Employees do not bid on shift assignments. Temporary employees are assigned to shifts based upon need, and there has been only one recent situation where a permanent employee had to switch shifts, and in that instance the employee was asked to switch and did so. With respect to promotion to group leader and managerial positions, permanent employees are eligible for consideration for these positions, but temporary employees are not.

Both temporary and permanent employees are eligible to work overtime. If overtime is available, it is first offered to the permanent employees in order of seniority, and then to temporary employees. If there are insufficient volunteers, then temporary employees can be required to work overtime by inverse order of seniority and then permanent employees by inverse order of seniority.

For seniority purposes, the Employer uses the original date of hire for both permanent and temporary employees, unless they have quit or been discharged and were later rehired, in which case the date of rehire is used. If an employee is laid off, the Employer continues to use the original date of hire for seniority purposes.

²² There is also an employee-funded and employee-administered sick leave program available to permanent employees.

Both temporary and permanent employees are subject to lay off. When layoffs occur, the temporary employees are laid off first, with selection based upon the Employer's needs and the employees' qualifications, without consideration of seniority. If the Employer must lay off permanent employees, the Employer first seeks volunteers, and if there are an insufficient number of volunteers, employees are selected for layoff by inverse order of seniority.

Based on upon the above and the record as a whole, it is clear that the Employer operates on a year-round basis with a core group of employees and has a fluctuating need for extra or on-call employees, whom the Employer calls temporary employees, to meet its seasonal workforce requirements. While the Employer draws its temporary employees from many sources, it gives first consideration to recalling laid off employees and uses their original date of hire as their seniority date. All employees, both permanent and temporary, share the same duties, working conditions, and supervision. While the Employer maintains a two-tier wage system, with the permanent employees on the upper tier, there are a number of temporary employees who are receiving the higher wage rate associated with the permanent employees. However, in general, the temporary employees do not receive benefits, while the permanent employees do. The record reveals that temporary employees have converted from temporary status to permanent status. Thus, of the 35 current permanent employees, 8 of the 9 most recently hired began their employment as temporary employees. Accordingly, in view of the regularity of employment of some of the temporary employees and the above-mentioned facts, which I find establishes that the temporary employees, when they work for the Employer, share substantially the same terms and conditions of employment as the regular employees, I conclude that those temporary employees who meet the criteria set forth below should be included in the unit.

It is well established that in cases involving year-round operations with fluctuating need for extra employees, the Board has found it equitable to include in the unit, on the basis of available records of employment, all extra or part-time employees who had worked a minimum of 15 days in the calendar quarter preceding the eligibility date, reasoning that devoting that

much time to unit work entailed a substantial and continuing interest in the unit. Scoa, Inc., 140 NLRB 1379, 1381-1382 (1963). Further, where such a fluctuating need shows a seasonal pattern, as in the instant case, and the timing of the election may tend to exclude employees with substantial records of employment during peak periods, the formula has been modified to include employees who worked a minimum of 15 days in either of the two 3-month periods immediately preceding the date of the issuance of the direction of election, and who have not been terminated for cause or voluntarily quit. Daniel Ornamental Iron Co., Inc., 195 NLRB 334, 335 (1972); C.T.L. Testing Laboratories, Inc., 150 NLRB 982, 985 (1965); Capitol Insulation Company, Inc., 233 NLRB 902 (1977). I find the latter formula to be appropriate herein since it balances the goals of holding a prompt election while also enfranchising the greatest number of eligible voters whose regularity and currency of employment demonstrates that they have a sufficient community of interest with the regular employees to warrant their inclusion in the unit. This formula is consistent with previous Board decisions involving similar issues, and neither the Employer nor the Petitioner has offered persuasive reasons for utilizing a different formula. Daniel Ornamental Iron Co., Inc., supra; Capitol Insulation Company, Inc., supra.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section of 9(b) of the Act:

All full-time and regular part-time production and maintenance employees employed by the Employer at its Linesville, Pennsylvania facility; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.²³ Eligible to

²³ Pursuant to Section 103.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the

vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible to vote are those employees in the unit who were employed 15 days during either of two 3-month periods immediately preceding the date below, and have not been terminated for cause or voluntarily quit. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been

Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed. The Board has interpreted Section 103.20(c) as requiring an employer to notify the Regional Office at least five (5) full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.

permanently replaced.²⁴ Those eligible shall vote whether or not they desire to be represented for collective bargaining by United Steelworkers of America, AFL-CIO, CLC.

Dated at Pittsburgh, Pennsylvania, this 15th day of September 2000.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
Room 1501, 1000 Liberty Avenue
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²⁴ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before September 22, 2000. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.